Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information;	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	
	)	
2000 Biennial Regulatory Review --	)	CC Docket No. 00-257
Review of Policies and Rules Concerning	)	
Unauthorized Changes of Consumers'	)	
Long Distance Carriers	)	

COMMENTS OF QWEST SERVICES CORPORATION

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October 21, 2002

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Pursuant to the Federal Communications Commission's ("Commission" or "FCC") request for comment in the *Third Further Notice of Proposed Rulemaking* ("*CPNI Third Further Notice*"),[1] Qwest Services Corporation ("Qwest") respectfully submits these comments. Qwest's comments focus on a single issue -- the appropriate regulatory treatment of Customer Proprietary Network Information ("CPNI") when a carrier sells all or a portion of its subscriber base or goes

[1] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended; 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers,* CC Docket Nos. 96-115, 96-149 and 00-257*, Third Report and Order and Third Further Notice of Proposed Rulemaking,* FCC 02-214, rel. July 25, 2002 (note: specific references to the *CPNI*

out of business. These Comments demonstrate that the Commission should adopt streamlined regulations for bulk transfers of CPNI associated with customer accounts similar to those rules it has already established for subscriber-base transfers. Such narrowly-tailored regulations should accommodate not only CPNI/customer account transfers to other carriers but also transfers to communications-related service providers.

I. INTRODUCTION AND SUMMARY

The Commission asks whether a carrier exiting a business or market "should be able to use CPNI for transition of its customers to another carrier."[2] The only rational answer is "yes." Neither the interests of consumers or carriers is served by a rule prohibiting the transfer of customers or accounts void of information necessary to service the account. Not only would such a prohibition adversely impact quality customer service, it would also increase "barriers to exit," contrary to the Commission's pro-competitive objectives and those of the Telecommunications Act of 1996. Accordingly, the Commission should adopt streamlined and narrowly-tailored rules that allow CPNI to transfer with associated customer accounts in those situations when a carrier exits a market, either voluntarily or involuntarily. Such regulations should be based on notice to consumers of the proposed transaction that also advises them that they have a choice of providers, and filings with the Commission that include declarations and explanations of compliance with the rules.

These rules should not be confined to carrier transferees. As the Commission has acknowledged, carriers are increasingly providing packages of services to customers in partnership with communications-related third parties (*e.g.*, Information Service Providers

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Third Further Notice of Proposed Rulemaking or the *CPNI Third Report and Order* are indicated herein as necessary).

[2] *CPNI Third Further Notice* at ¶ 146.

("ISP")).[3] As a natural outgrowth of such partnerships, or for other sound business reasons, carriers might decide to transfer customer accounts to communications-related parties on a more permanent basis. Such transfers would necessitate transferring the associated customer account that might incorporate CPNI. Therefore, CPNI/customer account transfer rules should accommodate these types of transfers, since the continuing relationship between the acquiring entity and the customer assures customer privacy is protected.

The Commission's existing slamming rules provide a solid foundation on which to build CPNI/customer account transfer rules. Those slamming rules are based on customer and Commission notice, and the provision of material information to consumers about the impending transfer and its effects. The Commission has specifically concluded that these rules strike an appropriate balance between the interests of consumers and legitimate commerce. A similar notice process for CPNI transfers associated with customer accounts would strike the same balance.

Specifically, CPNI/customer account transfer rules predicated on a notice process would protect customer privacy interests in the same way that such notice currently protects consumers' commercial interests in the case of subscriber-base transfers. Those interests are protected through advance notice of material information about the transaction to both consumers and the Commission, keeping the Commission informed and involved.

At the same time, the notice process would not unduly burden carriers engaging in pro-competitive, constitutionally-protected activities, such as communicating information and alienating property. If carriers had to transfer customer accounts without substantive information about customers' current products and usage, the acquiring carrier's ability to provide continued

[3] *CPNI Third Report and Order* at ¶¶ 45-49.

and quality services to its customers would be impaired. Conversely, when such information is transferred, the acquiring entity is better able to provide seamless service and satisfy the customer's expectations.

Given the Commission's existing advance notice process for subscriber-base transfers, adapting this process for CPNI/customer account transfers would minimize regulatory burdens for both the Commission and carriers. Such an approach would entail only modest modifications with respect to the content of carriers' biennial Section 222 CPNI notices to address the possible CPNI bulk transfers. And the subscriber-base transfer rules would have to be amended to incorporate a CPNI notice provision.

The notice process described above carefully balances the interests of carrier and consumers in the free flow of commerce and the seamless transition of service, with interests in the protection of CPNI. In contrast, a rule incorporating an opt-in component for CPNI bulk transfers to unaffiliated entities would raise serious constitutional questions and disserve the public interest. Proponents of opt-in requirements have so far been unable to demonstrate that such a rule can satisfy the standard for restrictions on commercial speech. There is no reason to believe that they would be able to do so in this context either. In addition, an opt-in process would threaten the seamless transition of service to customers who, due to inertia, neglect to act upon it. Thus, when compared to its alternative, a notice process for CPNI/customer account transfers appears all the more attractive, since pursuit of a different course will consume Commission resources to adopt and defend it and carrier resources to implement it.

II. CUSTOMER PRIVACY INTERESTS ARE NOT COMPROMISED BY TRANSFERS OF CPNI ASSOCIATED WITH TRANSFERRED CUSTOMER ACCOUNTS

A. Ongoing Business Relationships Protect Customer Privacy Expectations

No credible argument can be made that a customer whose account is transferred to another entity would object to the CPNI generated during the service relationship being transferred as well. This would be especially critical in those cases where the customer was not going to suffer a service discontinuance[4] and the acquiring service provider was eager to continue to provide service to customers.

At a minimum, an acquiring provider would need a customer's name, address and telephone number to be transferred with the account, as the Commission has acknowledged.[5] And reasonable people would expect, especially if there is to be a service continuation, that additional product and service information would be passed to support the transition and the future business relationship.

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[4] *See In the Matter of Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, *Report and Order*, 17 FCC Rcd. 5517, 5542-43 ¶ 50 (2002) ("*Section 214 Further Streamlining Order*").

[5] *See In the Matter of 2000 Biennial Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129*, 16 FCC Rcd. 11218, 11224-25 ¶ 16 (where the Commission observed that a transferee would be able to communicate with soon-to-be transferred customers because it undoubtedly would have access of some kind to the carrier's subscriber list) 2001 ("*Slamming Bulk Transfer Order*"). In a prior *Order*, the Commission held that a carrier's subscriber list (made up of customer name, address and telephone number information) was not CPNI. *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, Clarification Order and Second Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 16506, 16507 ¶ 2 and n.7 (2001).

The necessary additional information might be telecommunications-related CPNI. But it might also be information about information services -- non-CPNI. Whether the information is characterized as CPNI or not will not dramatically change a customer's expectation: that a carrier transferring customers to another will do so in a way that makes the transfer as seamless and easy for the customer as possible. Customers want that type of transition so that they can enjoy continued quality service within the new service relationship.

Just as the characterization of the information transferred does not give rise to increased privacy concerns, neither does the fact that a transferee may be a communications-related service provider rather than a carrier, particularly when appropriate safeguards attach to the information transfer and an ongoing business relationship is expected. Primarily, it is the ongoing business relationship that proves critical in assessing both the level of privacy concern and its concomitant protection.

Thus, while extending the category of transferees that may receive CPNI in a bulk transfer to non-carriers might, at first glance, suggest increased customer privacy concerns, the ongoing business blunts those concerns. An entity "with whom a customer has an existing business relationship has an incentive not to misuse its customer's CPNI."[6] In the case of CPNI bulk transfers associated with transfers of customer accounts, even where the transfer is to a non-carrier communications-related service provider, the ongoing relationship provides a powerful incentive to avoid the creation of customer privacy problems.

[6] *CPNI Third Report and Order* at ¶ 55. *Compare id.* at ¶¶ 51, 55 (where the Commission concludes that where there is no existing business relationship a third party would "have no incentive to honor the privacy expectations of customers" and would have "no accountability to the consumer").

B. CPNI/Customer Account Transfers To Third Party Communications-Related Providers Do Not Threaten Consumer Privacy

Privacy concerns may be keener when information is disclosed to third parties than when it is used solely within an organization.[7] But this does not end the analysis. Individuals' privacy expectations might wax and wane depending on how closely a third party receiving information about them resembles the transferor: the closer the transferee to the transferor in business and service, the less concern; the more disparate the businesses to the transaction, the greater the concern. This reasoning was clearly a factor in the Commission's decision that there was no serious privacy concern when a carrier shares CPNI with a third party communications-related provider in order to provide a package of services to a customer.[8] When supported by appropriate contractual safeguards, even residual privacy concerns are ameliorated.

While it is possible that privacy concerns increase as the identity of the transferee of customer information becomes less "like" the transferring carrier -- *e.g.*, a home improvement store or an on-line home shopping network -- the current record reflects no evidence that carriers intend to or would transfer customer accounts or customer information to such entities. It would be unnecessary and unwise for the Commission to craft rules restricting carriers' transfers of CPNI to communications-related service providers, who will have an ongoing relationship with a customer, based on speculation or conjecture about what "other third parties" might lurk in the wings as possible transferees. Predictable and differentiated privacy expectations must be factored into any CPNI/customer account transfer rule and those differences must be accommodated. A failure to do so impermissibly ignores the legitimacy of the commercial

[7] *CPNI Third Report and Order* at ¶¶ 35, 50-68.

[8] *Id.*

objectives associated with a CPNI/customer transfer and the fundamental speech characteristics of that transfer.

III. ADAPTING EXISTING SLAMMING RULES TO ADDRESS CPNI/CUSTOMER ACCOUNT TRANSFERS WOULD PROTECT CUSTOMERS WHILE MINIMIZING BURDENS ON CARRIERS, COMMERCE AND CUSTOMER SERVICE

Customers would not be well served by a regulatory mandate that a carrier transfer customer accounts without substantive information about customers' current products and usage. Nor would they be well served by a requirement that they be polled before such a transfer for their affirmative approval. Absent such approval -- caused for whatever reason -- their service would stop.

Such a regulatory regime would be at odds with other Commission goals that acknowledge the benefit of asset transfers where service discontinuance is avoided.[9] It would also be at odds with an acquiring service provider's ability to continue to provide quality services to its new customers unimpaired. Such an expectation of continued good will is undoubtedly a significant part of many customer account asset transfers.

Just as the Commission has protected customers' desires for seamless service transitions and avoidance of service disconnections in the case of customer account transfers, so should it protect those expectations in the case of CPNI transfers. With appropriate safeguards, commercial expectations can be accommodated and customers' service expectations met without either being jeopardized or compromised.

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[9] *Section 214 Further Streamlining Order*, 17 FCC Rcd. at 5547-49 ¶¶ 59-64; *see also*, *In the Matters of Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, *Report and Order in CC Docket No. 97-11, Second Memorandum Opinion and Order in AAD File No. 98-43*, 14 FCC Rcd. 11364, 11380-81 ¶¶ 29-32 (1999).

A. Customer Account And CPNI Are Similarly-Situated Assets Requiring Comparable Treatment

The Commission acknowledges the tie between the transfer of customer accounts and associated information.[10] The tie should eliminate any doubt whether carriers should have the ability to transfer CPNI along with an account.

As Qwest has elsewhere demonstrated to the Commission, CPNI is clearly a carrier asset.[11] While CPNI is as integral to a customer "account"[12] as customer name, address, and telephone number -- information the Commission has conceded must pass from a seller to a buyer in any rational transfer of a subscriber base[13] -- it is no less an asset in its own right.

With this in mind, then, the relevant question in this *Third Further Notice* is not whether CPNI is an asset but whether the government can restrict the passage of such information in the presence of demonstrated and legitimate purposes for such passage and the absence of demonstrated harm from it. Since the communication of CPNI remains embued with protected speech rights, the Commission cannot proceed to restrict the transfer of CPNI with an associated

[10] *CPNI Third Further Notice* at ¶ 146.

[11] Appended to this filing, and incorporated by this reference, Qwest attaches portions of its Opening and Reply Briefs in the case of *U S WEST v. FCC*, articulating the law supporting this assertion.

[12] *Slamming Bulk Transfer Order*, 16 FCC Rcd. at 11218 n.3. A customer-base bulk transfer might involve the "acquisition of assets (such as customer lines or accounts) or [occur] through a transfer of corporate control." *Id*. and at 11219 ¶ 2 (referencing customer accounts). *And see In the Matter of 2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, *Third Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 1186, 1189 n.10 (2001) (carrier-to-carrier subscriber base transfers can result from, among other transactions, the dissolution of joint ventures, bankruptcy sales, and the purchase of subscriber accounts) ("*Slamming Further Notice*").

[13] *See* note 5, *supra*.

customer account because of hypothetical privacy concerns or speculations about possible carrier conduct.

B. A Notice Process For CPNI Bulk Transfers Is In The Public Interest

Since a streamlined "notice process" exists that has already been found to provide protection for consumers and flexibility for carriers in the context of customer account transfers,[14] similar outcomes can be expected if the process is adapted for CPNI/customer account transfers. A notice process is as appropriate for the transfer of CPNI associated with a customer account as it is for the transfer of the account itself. The Commission should harmonize these asset transfer rules, treating bulk transfers of CPNI in the same narrowly-tailored manner it now treats transfers of customer accounts. There is no legitimate basis for treating these similar and associated assets or asset transfers in any materially different way. And the Commission's prior determination that consumers are protected by notice, choice and Commission involvement in the case of subscriber base transfers, compels a similar conclusion with respect to associated CPNI.

Similarly, the Commission's prior determination that carriers are only minimally burdened by such a regulatory model pertains with equal force to CPNI transfers associated with transferred customer accounts. While any regulation, including streamlined regulation, imposes costs on carriers, these costs have not proven unduly burdensome in the case of subscriber-based transfers. Such streamlined regulation is far less costly for carriers than a requirement that affirmative customer approval for CPNI/customer account transfers be obtained -- a difficult and infeasible task.[15] And it is substantially less costly than the waiver process employed prior to the

[14] *Slamming Bulk Transfer Order*, 16 FCC Rcd. at 11218-19 ¶ 1, 11222-23 ¶¶ 10-11.

[15] *Id.* at 11220 ¶ 4 (referencing such carrier claims within the context of subscriber base transfers).

adoption of the streamlined regulation -- a process that proved expensive for carriers and draining on the Commission.[16] In light of the "routine business transactions"[17] generally forming the foundation of asset transfers, streamlined regulation is far superior than rules that would drive carriers to waiver filings seeking relief due to "special circumstances."

C. Carriers And Non-Carrier Communications-Related Service Providers Alike Should Be Permitted To Use A Streamlined Notice Process

The Commission's current slamming rules controlling the transfer of customer bases contemplate that both entities to the transaction are carriers.[18] The *Third Further Notice* reflects a similar assumption.[19] But the assumption is tenuous. As carriers increasingly offer bundled service offerings and, perhaps, partner with others in those offerings, it becomes more predictable that customer account transfers will involve non-carriers.

The Commission should adopt simple notice rules for CPNI/customer account transfers, equally applicable to carriers and non-carrier transferees alike. Customers and transferees alike would benefit from a similar approach to the transfer of an account and associated information, regardless of whether the transferee is a carrier or a communications-related service provider. Potential transferees, other than carriers, that might benefit from a CPNI/customer account transfer notice process include a range of business entities. These might include communications-related service providers such as customer premises equipment ("CPE") vendors, independent (non-carrier) operator services or directory assistance providers, enhanced service providers ("ESP") (in the traditional sense) and ISPs (in the broadband sense).

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[16] *Id.* at 11219 ¶ 2, 11220 ¶ 5, 11221-22 ¶ 9.

[17] *Id.* at 11219 ¶ 2.

[18] 47 C.F.R. § 64.1120(e).

[19] *CPNI Third Further Notice* at ¶ 146, asking "whether an exiting carrier should be able to use CPNI for transition of its customers to another **carrier**" (*emphasis added*).

In both carrier and non-carrier transfers, the customer information transferred may involve the passage of CPNI as well as non-CPNI. The parties to a transfer transaction will need to identify which information is CPNI and which is not, since the streamlined rules will apply to the former but not the latter. And it can be expected that, over time, a non-carrier transferee will generate its own customer information. Residual CPNI will become either unrecognizable or marginally important.

For example, where a carrier is negotiating with a CPE vendor, that vendor may want only a subscriber list -- customer name, address and telephone information -- non-CPNI.[20] But that vendor may also want information about a customer's Caller ID service (CPNI). Or a carrier may decide to exit the voice messaging service ("VMS") business, selling its customers and associated VMS information to an ESP. That VMS information, *i.e.*, information about an information service, is not CPNI,[21] although the underlying basic service that supports the VMS may be.[22] In a similar vein, an ISP may want to purchase a carrier's customers who buy bundled Internet access service. The ISP may express a need for information not only about the Internet access but about the transport features, as well. In some cases, the customer's transport/access

[20] *See* note 5, *supra*.

[21] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061, 8081 ¶ 26, 8095 ¶ 45 (1998).

[22] The status of the information as end-user CPNI would depend on who purchased the underlying basic service element ("BSE"), usually a form of call forwarding. If paid for by the customer it would be end-user CPNI; if paid for by the VMS provider it would be that provider's CPNI even though the end user's service record would reflect the service element.

will be through Digital Subscriber Line ("DSL") service. Depending on how the transport was provided, the resulting information may or may not be CPNI.[23]

The Commission cannot anticipate every kind of commercial information transfer that might legitimately occur between a carrier and a non-carrier.[24] Parties typically negotiate such matters, sometimes in the context of fairly complex commercial transactions. Precisely what information will be needed to allow each party to realize the benefit of the bargain and to ensure

[23] The Commission asks about the relevance of the *Wireline Broadband* proceeding to the issues at hand. *CPNI Third Further Notice* at ¶ 146. There Qwest argues that "DSL + Internet access" is an information service, not a telecommunications offering, and that Congressional enactments as well as Commission precedent foreclose a contrary conclusion. *See* Comments of Qwest Communications International Inc. at 4-12, filed May 3, 2002 in response to the Commission's *Notice of Proposed Rulemaking* regarding the appropriate framework for Broadband access to the Internet over wireline facilities, CC Docket Nos. 02-33, 95-20 and 98-10. Similarly, if an ISP purchased DSL in bulk from Qwest and bundles that DSL (the ISP's DSL) -- which may continue to be branded as Qwest service -- into an Internet access offering, the derived information would not be end-user CPNI but either ISP CPNI or information about a non-common carrier service. *See id.* at 12-21 wherein Qwest argues that a local exchange carrier's provision of bulk DSL transmission capacity to ISPs is a "private carriage" service and not a "common carriage" service or a "telecommunications service" within the scope of Title II. The distinctions between CPNI and other types of information in the possession of carriers is not always appreciated.

[24] Not only is there difficulty in predicting precisely what information would need to be transferred, there is considerable problem if the Commission prescribes too narrowly how the needed information be delivered. While it may be comforting to imagine that all carriers have systems that can transfer customer accounts and customer information to third parties so that only that information absolutely necessary to accomplish the transaction be transferred, such is not the case. Carriers' information systems were generally designed for internal company use, not for creating records for transfer to others upon the exit of a business or market. Thus, the ability of these systems to "cull out" only that information absolutely **necessary** to support a transfer agreement will be quite limited. The Commission must not, therefore, draft a broadly-worded CPNI bulk transfer rule that states that carriers can transfer only that CPNI necessary to render the customer service. Enactment of such a rule would simply lead to carriers lining up with waiver requests. Rather, the Commission should require that carriers impose appropriate contractual safeguards addressing the confidentiality of any transferred information, including that necessary for the transaction as well as possible surplus information. Most carriers' contract provisions regarding "confidentiality" would already prove sufficient for this purpose.

future quality customer service cannot be accurately predicted. The Commission, therefore, should not try.

Eschewing predictions about future information transfer needs, then, the Commission should rely on the simplicity incorporated in the existing slamming rules for subscriber-base transfers. Entities who receive CPNI from transferring carriers should notify customers 30 days in advance that they will be acquiring that information, they should advise customers that they can choose other service providers, and should be contractually bound to file required paperwork with the Commission evidencing compliance with the rules.

D. Existing Rules Require Only Minor Modifications To Adapt Them For CPNI/Customer Account Transfers

When both parties to a CPNI/customer account transfer are carriers, changes to existing rules can be fairly simple. First, the Commission may deem it appropriate to require that carriers' Section 222 CPNI notice-and-opt-out communications with customers address the general subject matter of CPNI bulk transfers. Second, the rules pertaining to what content must be in a letter from an acquiring carrier to affected customers should be amended to include a provision for CPNI transfers if such transfers are to occur.[25] Third, the "self-certifying" provisions of the slamming rules would need to be amended to incorporate a contractual safeguard requirement to cover those cases where the transferee is not a carrier.

1. Changes to Section 222 Rules

It is eminently reasonable for carriers to address CPNI bulk transfers in their biennial communications with their customers when they address CPNI uses in general. The Commission need not prescribe the content of provisions dealing with CPNI bulk transfers. It need only require that the matter be addressed.

In their notices, carriers might provide examples of the kinds of commercial transactions that could lead to CPNI/customer account transfers, such as sales of a part of a business or an entire operation, mergers and acquisitions and bankruptcies.[26] And carriers might tell customers how they anticipate addressing CPNI limitations in the context of a future CPNI/customer account transfer. Carrier A might commit to contractually bind any transferee to honor all prior customer opt-out designations. Carrier B might take a different approach and advise customers that the matter will be the subject of future negotiations with the transferee, while committing to communicate the final determination in advance of the transfer itself.

If the Commission deems it appropriate for a carrier to include a "CPNI bulk transfer description" in a Section 222 opt-out approval communication, it must allow the CPNI bulk transfer description to operate only as a disclosure and not to create a contemporaneous opportunity for the exercise of choice. That is, upon notice, a customer today should not be able to opt out of being included in a bulk transfer activity in the future. There are a number of reasons why this approach is critical. First, allowing customers to exercise choice ("opt out") regarding future marketing activity is materially different from allowing them to opt out of an asset transfer. The former requires marking a record; the latter involves removing the record from the transfer process. Most carriers are not currently in a position to cull out and track this kind of information with respect to a possible future transaction. Second, should any CPNI bulk transfer occur in the future, customers will be provided with notice and extended the opportunity to change service providers. This is the "choice" currently extended under the subscriber-base transfer rules, and it is a reasonable choice to incorporate in a Section 222 CPNI opt-out notice.

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[25] This provision will be equally applicable to carrier and non-carrier transferees.

[26] Carriers should not have to identify every possible fact pattern that might lead to a customer base transfer. Examples should be sufficient.

Alerting the customer to a future possibility, and providing actual notice if and when that possibility becomes a reality, protects customer privacy interests through full and fair disclosure.

2. Transferee Communications Prior to a CPNI Transfer

a. Notifications to Customers

Under the subscriber-base transfer model, transferees must communicate with affected customers 30 days prior to the transfer. This requirement would not change. What would change is that the communication would have to address CPNI transfers in the event CPNI was transferring.

The Commission should not prescribe restrictions or mandate specific choices that a transferee must extend to an affected customer in the event of a future CPNI transfer.[27] Parties should be permitted to negotiate the appropriate treatment closer to the time of transfer so that the approach best fits the needs of the contracting parties and affected customers. In many cases, Qwest imagines that the parties will agree that prior CPNI opt-out designations must be honored.[28] In other cases, the transferee will undertake its own approval process.[29] Or a transferee might decide it best serves its future customers to **both** honor past CPNI designations and seek future approval. So long as the transferee accurately tells affected customers, prior to the CPNI bulk transfer, how it intends to treat transferred CPNI, customer privacy interests are accommodated and customers can register their choices.

[27] *Compare CPNI Third Further Notice* at ¶ 146 (asking whether a transferee should be obligated to honor all prior customer opt-out designations or should be expected to engage in its own approval process).

[28] *Id.* This was one of the Commission's inquired-about restrictions.

[29] *Id.* This is another possible restriction that the Commission asks about.

b. Certification Filings with the Commission

The acquiring entity, be it carrier or non-carrier, would also be obligated to file the self-certifying paperwork with the Commission 30 days in advance of the transfer. Required carrier filings with the Commission, in advance of any consummated transfer, keep the Commission informed and involved, "ensuring that consumers are protected."[30] In the case of carrier-transferees, the certification filing requirement would run directly to the carrier. Where the acquiring entity is a non-carrier, carriers can be required to include contractual provisions placing the filing obligation on the transferee.[31]

As an additional protective measure, the Commission might require bolded and prominent disclosures in the cover filings made with the Secretary in those cases where CPNI is transferred. That bolded information would state what CPNI was being transferred and what restrictions were being placed on its use or future resale, if any. Armed with this information, the Commission could confront any transferring carrier that it deemed poised to transfer CPNI without taking reasonable precautions.

This screening process would help the Commission convert any generalized privacy concerns about CPNI transfers to targeted concrete cases where facts give rise to a need for further inquiry. There is no empirical record evidence that carriers have an incentive to abuse CPNI in the context of bulk transfers or that they intend to sell CPNI outside of a customer

[30] *Slamming Bulk Transfer Order*, 16 FCC Rcd. at 11219 ¶ 2. *And see id.* at 11222 ¶ 10 (the filing process "provide[s] the Commission with information it needs to fulfill its consumer protection obligations.").

[31] Where a transferee is not a carrier, a transferring carrier could include this obligation in its contract with the transferee. *Compare* 47 C.F.R. § 64.1511(b) (prescribing that carriers assigning pay-per-call numbers require, either through tariff or contract, that the pay-per-call providers have procedures in place to accomplish refunds and forgiveness of charges).

account transfer.[32] Thus, it is all the more critical that the Commission regulate CPNI transfers from a position of knowledge rather than conjecture.

3. Reasonable Additional Safeguards for CPNI Transfers to Non-Carriers

In its *Third Report and Order*, the Commission prescribed safeguards for carriers sharing CPNI with joint venture partners or independent contractors in the provision of either telecommunications or communications-related services.[33] In the context of an asset transfer to a communications-related provider where there is a change of ownership, some of these safeguards remain relevant and others do not.

Among the previously-identified safeguards remaining relevant is the requirement that a carrier contractually bind a non-carrier transferee to have adequate privacy protection processes in place. But the safeguards limiting the transferee's use of CPNI for other than communications-related services and prohibiting future CPNI transfers are not relevant when a change of ownership is occurring. This is especially true where non-CPNI is being transferred also as a part of the transaction.

The Commission has expressed its concern over CPNI disclosures to third parties unaffiliated with carriers.[34] But in the absence of any evidence of carrier misconduct in this area, the Commission should not act at this time to prescribe or proscribe activity or outcomes in a post-transfer environment. During this time of respite, the Commission can review actual contractual restrictions transferring carriers have imposed on non-carrier transferees and assess

[32] *Compare CPNI Third Report and Order* at ¶ 55 ("as data mining and personalization capabilities mature, the value of personal information increases, as do the carrier's incentive and opportunity to sell CPNI and third parties' incentive and opportunity to purchase it").

[33] *CPNI Third Report and Order* at ¶ 47.

their reasonableness or lack thereof. Through the self-certifying filing process, it can determine what transferees say to customers about how they are going to use CPNI and decide whether the representations warrant additional inquiry.

This type of screening approach is an appropriate and balanced response to legitimate -- but yet unrealized -- privacy concerns. The strong arm of regulation should be restrained until such time as empirical evidence points to consumer harm. Such a watchful but restrained approach is particularly appropriate given the speech interests associated with the communication of customer information and the certainty that CPNI, once transferred to a non-carrier communications-related service provider, will increasingly become non-CPNI. That information should be able to be used for any lawful reason.

IV. CONSTITUTIONAL CONSIDERATIONS MUST CONTINUE TO EDUCATE CPNI APPROVAL PROCESSES AND TRANSACTIONS

Beyond the practical considerations of the cost/benefit associated with a carrier's exiting a market or a line of business and the potential CPNI bulk transfers that might concomitantly occur, there remain abiding constitutional imperatives associated with CPNI/customer account transfers. Settled constitutional principles support the adoption of notice rules similar to those that exist for customer-base transfers.

It is clear that CPNI transfers implicate speech interests.[35] These implications exist regardless of whether the transferee is a carrier affiliate, a third-party carrier or a third party

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[34] The Commission comments that a non-carrier transferee could "resell or use the CPNI in any lawful way without limitation," including possibly "selling or providing access to personal information to the highest bidder." *CPNI Third Report and Order* at ¶¶ 54-55.

[35] *U S WEST, Inc. v. FCC,* 182 F.3d 1224 (10th Cir. 1999), *cert. denied,* 530 U.S. 1213 (2000) ("*U S WEST v. FCC*").

communications-related service provider.[36] While the status of a transferee may be material when determining the nature of the individual's privacy concern and the government's interest in protecting those concerns, the Commission must still engage in a rigorous *Central Hudson*[37] analysis to arrive at a narrowly-tailored regulation for CPNI bulk transfers.[38]

Under *U S WEST v. FCC*, and the guiding principles of *Central Hudson*, the Commission's continuing challenge when addressing CPNI matters -- including those involved in the *Third Further Notice* -- remains to determine "whether, consistent with the Constitution, the government may prohibit carriers from exercising their First Amendment right to provide truthful information" to others in circumstances that reflect legitimate and unextraordinary

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[36] *Id.* at 1237-38. Nothing in the Court's opinion suggests that the *constitutional standard* to be applied to government regulation of CPNI is different when addressing internal versus external transfers. And the very fact that the Court expressly recognized First Amendment considerations when two affiliated corporations communicate CPNI information (*id.* at 1233 and n.4) demonstrates that corporate-to-corporate communications -- be they between affiliated entities or not -- implicate First Amendment considerations.

[37] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) ("*Central Hudson*"). As outlined by the Tenth Circuit, assuming the lawfulness of the speech under consideration (a predicate factor), "the government may restrict the speech only if it proves: '(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.'" *U S WEST v. FCC,* 182 F.3d at 1233 (referencing *Central Hudson*, 447 U.S. at 564-65; other citation and footnote omitted).

[38] In its *Third Report and Order*, the Commission states that "Even Qwest, which previously indicated it would challenge an opt-in requirement for third-party disclosure . . . now only asserts a right to use telemarketers or to engage in joint marketing with 'appropriate . . . protections for the confidentiality of the information.'" *CPNI Third Report and Order* at ¶ 59. Qwest questions whether its position is captured correctly by this observation. In the documents referenced by the Commission as representing a "change" of position, or the pursuit of a more limited right, Qwest articulated what its present needs were with respect to the use of CPNI and argued that governmental action that would frustrate those reasonable needs would not be sustainable under constitutional First Amendment principles. But in none of its previous filings, either before this Commission or state commissions, has Qwest claimed a limited First Amendment right to use CPNI. In all cases it has asserted that the government must defend and support any restrictions on legitimate CPNI uses.

commerce and that only minimally affect customer privacy interests.[39] A disciplined analysis will result in the Commission's adoption of a CPNI bulk transfer rule similar to that currently in place regarding customer transfers.

Attempts to justify opt-in customer approvals in a CPNI bulk transfer context, citations to undocumented customer privacy concerns, or failure to engage in a rigorous cost/benefit analysis,[40] could easily impede *bona fide* commercial and societal goals.[41] Commission movement in this direction would compromise legitimate commercial transactions and embroil carrier and regulatory resources alike in burdensome waiver processes or ongoing litigation. An approach along the lines proposed by Qwest avoids these perils.

The fact that a notice-type regulation would not unduly compromise the alienation of property or raise Fifth Amendment concerns also weighs in favor of its adoption. Businesses should not have to assume extraordinary regulatory obligations before they can engage in ordinary commercial transactions. Carriers should be able to hold or divest business assets as deemed appropriate by the management of the business acting in the best interest of the owners. Management's discretion in this area should not be stymied by burdensome regulation unsupported by customer need or demonstrated harm. Streamlined regulation incorporating a notice process provides the right balance, while still providing appropriate rules to protect reasonable individual privacy interests.

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[39] Qwest November 1, 2001 Comments at 2-3, 20-21, CC Docket Nos. 96-115 and 96-149.

[40] *U S WEST v. FCC*, 182 F.3d at 1238-39 (cost/benefit analysis required, and the costs may include real costs as well as societal costs of depressing information flows).

[41] *See id.* at 1235 n.7 (noting potential societal costs that can be caused by restrictions on information flows in the name of privacy protection).

V. CONCLUSION

Qwest urges the Commission to adopt a notice process, similar to that currently used for subscriber-based transfers, for the transfer of associated CPNI. Such rules should provide for CPNI/customer account transfers to both carriers and communications-related service providers. Appropriate safeguards can be appended to the process so that alienation of property is not unduly impeded and customers' privacy interests are protected.

Respectfully submitted,

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October 21, 2002

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SBC COMMUNICATIONS INC., *et al*.,

Intervenors.

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B. THE *ORDER* FAILS TO GIVE PROPER WEIGHT TO THE FIFTH AMENDMENT PROPERTY INTERESTS IMPLICATED BY THE CPNI RULES

The *CPNI Order* also raises grave constitutional issues under the Takings Clause of the Fifth Amendment. The Commission stripped carriers of their property interest in CPNI altogether by declaring that "to the extent CPNI is property . . . it is better understood as belonging to the customer, not the carrier." *CPNI Order* at ¶ 43.

The FCC implemented this pronouncement by imposing a prior affirmative consent requirement for carrier use of CPNI outside existing service categories. As already noted, such customer veto power on carriers' ability to use CPNI for productive (indeed, constitutionally protected) purposes will have a devastating effect. In short, the *CPNI Order* denies carriers the ability to use their valuable property in order to promote the supposed social policies favored by the Commission.

Fifth Amendment analysis must begin with the Supreme Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), which held that the Takings Clause protects stored data and that the government's use of private proprietary research data constituted a compensable taking. Similarly, an appropriation of a carrier's proprietary commercial business information pertaining to its transactions with its customers amounts to a taking. As one scholar has concluded in the context of customer information, "[a] legislative, regulatory, or even judicial determination that denies processors the right to use their data could very likely constitute a taking and require compensation. . . . [F]or the billions of data files currently processed and used by U.S. individuals and institutions, a dramatic alteration on user rights makes a compelling case for the existence of a taking." Cate, PRIVACY IN THE INFORMATION AGE, *supra*, at 74.

The FCC's decree that CPNI belongs to customers, not carriers, does not avoid the takings principle. Rather, it *underscores* the constitutional violation. The Government may not divest a private person of his property "by ipse dixit. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The FCC "may not sidestep the Takings Clause by disavowing traditional property interests[.]" *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1931 (1998). In *Phillips*, the Supreme Court held that interest earned on client funds in

IOLTA accounts is "private property" of the client, notwithstanding a state's attempt to deem the interest to be public property. In the same way, the FCC may not decree that carriers no longer own their customer information. *See also Preseault v. ICC*, 494 U.S. 1, 20 (1990) (O'Connor, J., joined by Scalia and Kennedy, JJ., concurring) (opining that federal agency could not override state-law entitlements by deeming reversionary interests preempted under federal law).

In this case, it is clear that CPNI belongs to a carrier, not to the customer. The telephone company, not its customers, owns its property. "The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary." *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31 (1926). "Customers pay for service, not for the property used to render it….By paying bills for service, they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company." *Id.; see also Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 22 n.1 (1986) (Marshall, J., concurring in the judgment); *Simpson v. Shepard*, 230 U.S. 352, 454 (1913) (a utility's "property is held in private ownership").

CPNI is a record of the subscription for service which is provided and delivered over the *carrier's* network. CPNI is gathered, organized, maintained, and stored by carriers, not by customers. If a third party were to break into a carrier's computers and steal CPNI, it would be the carrier (and not individual subscribers) who would have a cause of action for conversion. The Commission did not deny that CPNI is "commercially valuable to carriers." *CPNI Order* at ¶ 2. The Commission itself explained that carriers "view CPNI as an important asset of their business" and "hope to use CPNI as an integral part of their future marketing plans." *Id.* at ¶ 22.

For the carriers who have spent billions of dollars accumulating CPNI on the settled understanding that they owned it, the FCC's proclamation that the property now belongs to customers upsets investment-backed expectations that the Takings Clause protects. *Monsanto,* 467 U.S. at 1005; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Indeed, the Supreme Court recently warned that "statutes should not be construed in a manner that would impair existing property rights," because doing so "can deprive citizens of legitimate expectations and upset settled transactions." *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2151 (1998) (plurality opinion) (internal quotation omitted). In *Eastern Enterprises*, the Court held that a federal coal

miner health benefit statute could not be applied retroactively, with a plurality finding the law an impermissible taking, rather than an appropriate regulatory initiative, because of "the economic impact of the regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action." *Id.* at 2146 (internal citation omitted).[1]

That CPNI pertains to the purchasing characteristics of customers does not give them a property interest in it. Even personal data like telephone numbers, addresses, social security numbers, and medical history — let alone records of purchases and economic transactions — are almost always owned by someone else: the Post Office, the government, a bank, or a physician or hospital.[2] A surveillance camera outside a bank or department store may capture the image of persons entering or leaving the establishment without their permission. The resulting footage belongs to the bank or the store, not to the customers, even though their images are depicted in it. 17 U.S.C. §§ 101-06. In the same way, "[a] data processor exercises property rights in his data because of his investment in collecting and aggregating them with other useful data. It is the often substantial investment that is necessary to make data accessible and useful, as well as the data's content, that the law protects." Cate, PRIVACY IN THE INFORMATION AGE, *supra*, at 74. As one noted scholar has observed, "the expand[ing] protection for commercial information reflects a growing awareness that the legal system's recognition of the property status of such information promotes socially useful behavior" and therefore encourages reliance by data processors. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 469 (1991).

To hold that customers rather than carriers own CPNI would have revolutionary implications for a panoply of service companies, such as credit card companies, mail order

[1] Justice Kennedy, concurring in the judgment and dissenting in part, would have applied the same factors as a matter of substantive due process.

[2] The Supreme Court has held that individuals have no reasonable expectation of privacy in the telephone numbers dialed from their phones, *see Smith v. Maryland*, 442 U.S. 735 (1979), or even with respect to checks and deposit slips used in banking. *United States v. Miller*, 425 U.S. 435, 443 (1976); *see also California Bankers Ass'n v. Schultz*, 416 U.S. 21, 69-70, 73-76 (1974) (upholding numerous banking transaction recordkeeping and reporting requirements).

catalogs, direct marketing companies, and other databases housing comparable consumer information. The assets these companies have developed through the investments of billions of dollars would be wiped out. And if personal information is property of the customer, then the implication is that the "owner" must give permission for every use or collection of the information (personal address books and Rolodex files, for example), not just commercial uses. The consequences of the FCC's pronouncement are as staggering as they are unanalyzed by the Commission.

The Commission tried to defend its CPNI restrictions by maintaining that its *Order* "does not deny all economically beneficial use of property." *CPNI Order* at ¶ 43 (internal quotation). But the *Order does* destroy the value of that portion of the CPNI as to which consumer consents cannot be obtained. It may no longer be used for communications between corporate affiliates and divisions, or for communications with customers for new services outside the existing service relationship. Further, the Supreme Court has repeatedly rejected the FCC's argument that a regulation that does not take every last stick in a bundle of property rights cannot be a taking. In *Hodel v. Irving*, 481 U.S. 704 (1987), for example, the Court struck down a federal statute restricting the ability of Native Americans to pass certain undivided fractional interest in land to their heirs by intestacy or devise, even though they retained full beneficial use of the property during their lifetimes as well as the right to convey it inter vivos. The Court explained that "[t]he fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex inter vivos transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property." *Id.* at 716. In *Babbitt v. Youpee*, 117 S. Ct. 727 (1997), the Court reaffirmed this holding and invalidated an amended version of the same statute. The Court rejected the Government's contention that the statute satisfied the Constitution's demand because it did not diminish the owner's right to use or enjoy property during his lifetime, and did not affect the right to transfer property at death through non-probate means. The Court opined that "[t]hese arguments did not persuade us in *Irving* and they are no more persuasive today." *Id.* at 733.

The FCC's argument was also rejected in *Ruckelshaus,* where the Court specifically noted that the data submitted with a pesticide application has a variety of uses to the producer. *See* 467

U.S. at 1012 ("That the data retain usefulness for Monsanto even after they are disclosed — for example, as bases from which to develop new products or refine old products, as marketing and advertising tools, or as information necessary to obtain registration in foreign countries — is irrelevant to the determination of the economic impact of the EPA action on Monsanto's property right.").

Here, the *CPNI Order's* severe burden on carriers' ability to use CPNI to market new categories of services raises such serious Fifth Amendment questions that it should be invalidated.

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B. THE *ORDER* RAISES GRAVE QUESTIONS UNDER THE FIFTH AMENDMENT.

1. A Carrier Is Not A Mere "Custodian" Of CPNI.

The FCC contends, without citation, that a telephone company holds CPNI merely as a "custodian" for its customers, "for the limited purposes of performing its services as a telephone company." FCC Br. 23. But no respondent cites, let alone addresses, the Supreme Court's holding that even a public utility (let alone a local telephone company, which by federal law cannot hold a local franchise and is subject to competition, 47 U.S.C. §§ 251-253) does not stand in a fiduciary relationship with its customers. "The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary." *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31 (1926). "Customers pay for service, not for the property used to render it. . . . By paying bills for service, they do not acquire any interest, legal or equitable, in the property used for the convenience or in the funds of the company." *Id.* *See also Simpson v. U S WEST Communications*, 957 F. Supp. 201, 206 (D. Or. 1997) ("as a matter of law, . . . a telephone company is not in a 'fiduciary relationship' with its customers").[3]

Furthermore, confidential customer information, including records of customer purchasing habits, has long been deemed protected commercial property. *See, e.g., DeVries v. Starr*, 393 F.2d 9, 13 (10th Cir. 1968) (confidential customer list is a trade secret); Restatement (Third) of Unfair Competition § 42, comments (e) and (f) (1995) (business information such as customer lists are protected property); Melvin F. Jager, Trade Secrets Law § 3.03[2][c], at 3-45 (1998) ("customer identities and related information can be a company's most valuable asset");

[3] The Supreme Court rejected a much more modest position than that advanced by the FCC here, in holding that the "extra space" (up to one ounce for first-class mailing) in public utility billing inserts could not be appropriated by a state public utility commission and used to force a utility to distribute the messages of a pro-consumer group. *Pacific Gas & Electric Co. v. Public Utilities*

Edward C. Wilde & Gary A. Nye, *The Customer List as Trade Secret*, 2 Intellec. Prop. Law 135, 139 (1994) ("personal information concerning customers constitutes protected confidential information").[4] Indeed, cases from virtually every state confirm the property interest in confidential customer information.[5]

Comm'n, 475 U.S. 1, 17-18 (1986) (plurality opinion). *See also id.* 22 n.1 (Marshall, J., concurring in the judgment).

[4] *See, e.g., Sigma Chemical Company v. Harris*, 794 F.2d 371, 374 (8th Cir. 1986) (company records of customer purchasing habits were protected trade secrets); *Zoecon Indus. v. The American Stockman Tag Co.*, 713 F.2d 1174, 1179-80 (5th Cir. 1983) (memorandum containing the names, addresses, and purchasing characteristics of a business's customers is a trade secret under Texas law*); Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1331 (9th Cir. 1980) (Kennedy, J.) (salesman's experience with plaintiff's customers, their buying habits, purchasing history, and other special considerations raised issue of fact as to whether knowledge of salesman constituted protectable trade secret); *W.R. Grace & Co. v. Hargadine*, 392 F.2d 9, 16 (6th Cir. 1968) ("customer books and customer service information materials . . . clearly belonged to" the manufacturer that compiled them); *All West Pet Supply Co. v. Hill's Pet Prods. Div.*, 840 F. Supp. 1433, 1438 (D. Kan. 1993) (customer purchasing patterns, sales volumes, and payment histories could qualify as trade secrets).

[5] *Tyler v. Eufaulo Tribune Pub. Co.*, 500 So.2d 1005 (Ala. 1986); *Amex Distrib. Co. v. Mascari*, 724 P.2d 596, 602 (Ct. App. Ariz. 1986); *Allen v. Johar, Inc.*, 823 S.W.2d 824, 827 (1992); *Reid v. Massachusetts Co.*, 318 P.2d 54, 60 (Cal. App. 1957); *R&D Bus. Sys. v. Xerox Corp.*, 152 F.R.D. 195, 197 (D. Colo. 1993); *Holiday Food Co. v. Munroe*, 426 A.2d 814 (Conn. 1982); *Delmarva Drilling Co. v. American Well Sys., Inc.*, No. 8221, 1988 WL 7396 (Del. Ch. Jan. 28, 1988); *Unistar Corp. v. Child*, 415 So.2d 733, 734 (Fla. App. 1982); *Avnet, Inc. v. Wyle Labs, Inc.*, 437 S.E.2d 302 (Ga. 1993); *Stampede Tool Warehouse, Inc. v. May*, 651 N.E. 209, 214 (Ill. App.), *review denied*, 657 N.E.2d 639 (1995); *Ackerman v. Kimball Int'l*, 652 N.E.2d 507, 509 (Ind. 1995); *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 228 (Iowa 1977); *Koch Eng'g Co. v. Falconer*, 610 P.2d 1094, 1104 (Kan. 1980); *Wright Chem. Corp. v. Johnson*, 563 F. Supp. 501 (M.D. La. 1983); *Space Aero Prods. Co. v. R.E. Darling Co.*, 208 A.2d 74 (Md.), *cert. denied*, 382 U.S. 843 (1965); *Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 926 (Mass. 1972); *Chem Trend, Inc. v. McCarthy*, 780 F. Supp. 458 (E.D. Mich. 1991); *Surgidev Corp. v. Eye Tech, Inc.*, 828 F.2d 452, 455-46 (8th Cir. 1987) (Minn. Law); *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 18-19 (Mo. 1966); *Cudahy Co. v. American Labs., Inc.*, 313 F. Supp. 1339, 1343-44 (D. Neb. 1970); *Home Gas Corp. v. Strafford Fuels, Inc.*, 534 A.2d 390 (N.H. 1987); *Mailman, Ross, Toyes & Shapiro v. Edelson*, 444 A.2d 75, 78 (N.J. Ch. Div. 1982); *Salter v. Jameson*, 736 P.2d 989, 991 (N.M. App. 1987); *McLaughlin, Piven, Vogel, Inc. v. W.F. Nolan & Co.*, 498 N.Y.S.2d 146 (2d Dept. 1986); *Drouillard v. Keister Williams Newspaper Serv.*, 423 N.E.2d 324, 327 (N.C. App. 1992); *Advanced Bus. Tels., Inc. v. Professional Data Processing, Inc.*, 359 N.W.2d 365, 367-68 (N.D. 1984); *Consumer Direct, Inc. v. Limbach*, 580 N.E.2d 1073, 1075 (Ohio 1991); *Morgan's Home Equip. Corp. v. Martucci*, 136 A.2d 838, 842 (Pa. 1957); *Paramount Office Supply v. MacIsaac, Inc.*, 524 A.2d 1099, 1011 (R.I. 1987); *1stAm. Sys., Inc. v.*

The FCC's contrary view, if permitted to stand, would work a revolution not only in the telecommunications industry, but in many other sectors of American commerce, including credit card companies, grocery stores, mail-order catalogs, banks, Internet service providers, and other companies that maintain individually identifiable customer information as a valued part of their routine business operations. *See* Brief of Amicus Information Industry Association. It is settled law that such information belongs to the companies that generate, compile, and maintain it, and it is nothing short of astonishing for respondents to suggest otherwise.

Hence, petitioners have plainly established a reasonable, investment-backed expectation in their ability to use CPNI for productive purposes. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court held that state law creates a property right in trade secrets for purposes of the Fifth Amendment. *Id.* at 1003-04. The Court opined that, if the federal government could "'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality." *Id.* at 1012. *See also Preseault v. ICC*, 494 U.S. 1, 22-23 (1990) (O'Connor, J., joined by Scalia and Kennedy, JJ., concurring) (federal regulatory program works a taking if it upsets state-law property rights).[6]

2. <u>The Commission's Prior Practice Refutes Its Argument.</u>

The FCC contends that its assertion that CPNI belongs to customers rather than carriers is nothing new. But none of the respondents denies that the *CPNI Order* reflects a radical departure from prior Commission policy. The most the Commission can muster to justify its turnaround is

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Rezatto, 311 N.W.2d 51, 58-59 (S.D. 1981); *One Stop Deli, Inc. v. Franco's, Inc.*, 1993 U.S. Dist. Lexis 17295 (W.D. Va. 1993); *B.C. Ziegler & Co. v. Ehren*, 414 N.W.2d 48, 50 (Wis. App. 1987); *Ridley v. Krout*, 180 P.2d 124, 131 (Wyo. 1947).

[6] Respondents argue that *Ruckelshaus* is inapplicable because there is no comparable federal statute here guaranteeing the right to use CPNI. But state law supplies the relevant property right. *See Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1930 (1998). And here no pre-existing federal program comparable to the pre-1978 pesticide program in *Ruckelshaus* calls into question petitioners' property interest.

an offhand reference in the *AT&T CPE Relief Order*, 102 F.C.C.2d 655 (1985). However, that Order undermines rather than supports the FCC's position. Despite its reference to ownership, the Order permitted AT&T to use CPNI for all legitimate business purposes. In the *AT&T CPE Relief Order*, the Commission *allowed* data collected in AT&T's telephone operations to be shared with personnel in a different AT&T division, which sold CPE (such as telephones) to consumers. The only constraint imposed by the Commission was a notice and opt out requirement - the very regulatory option that the FCC has rejected in this context and that petitioners are willing to accept.

Far from restricting AT&T's use of the commercial information, the FCC explained that "AT&T's CPE sales personnel will . . . have a legitimate need for access to customer proprietary information dealing with network services. *Id.* at 693. The FCC rejected the arguments of AT&T's competitors that they were entitled to access to information on the same terms and conditions: "given that AT&T's CPE sales personnel will have access to all customer proprietary information under this plan, providing equivalent access to all CPE vendors would require AT&T to make all its large customers' information public. Since this information belongs to the customers, and many may not want it to be made public, this approach is also unacceptable." *Id.*

Thus, the FCC considered the customers' interest in the information only in the context of rejecting an obligation that would have required AT&T to disclose its commercial information to unaffiliated third parties. The FCC saw no privacy or customer ownership issues in AT&T's own use of the data – even use by a different division of AT&T. The *AT&T CPE Order* thus strongly supports petitioners' position here.

3. <u>The Rules Raise Serious Takings Issues.</u>

Respondents contend that this is merely a case where the government has affected the value of property by regulation. Respondents implicitly concede that a regulation is invalid if, in

the words of Justice Holmes, it "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). But respondents insist that whether a taking has occurred depends on "the character of the [government's] action and its purported economic impact." MCI Br. 15. There are two flaws in respondents' argument.

First, the CPNI rules do not simply prevent carriers from using CPNI. They also purport to transfer ownership of it to customers, in whom the rules vest the power of prior affirmative consent. Respondents' do not deny that "a law that takes property from A. and gives it to B.," *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2146 (1998) (plurality opinion) (citation omitted), is a classic form of taking, regardless of the economic impact on the owner A. *See* MCI Br. 17 (laws which "transfer ownership interest to . . . third parties").

Second, respondents are wrong to argue that "this *Court* must weigh the 'public and private interests' affected by the *CPNI Order*." CPI Br. 25 (emphasis added). The *FCC*, not this Court in the first instance, has the responsibility of examining the economic effect of the CPNI rules, their impact on petitioners' investment-backed expectations, and the remainder of the factors cited by respondents. The FCC has the obligation to engage in a reasoned analysis of the takings issue. It has the duty to construe Section 222 to avoid a takings question. It is forbidden from adopting regulations that "directly implicate[] the Just Compensation Clause of the Fifth Amendment." *Bell Atlantic Corp. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). The FCC discharged none of those duties here. Instead, the Commission – no doubt heavily influenced by its faulty theory that carriers have no ownership interest at all in CPNI -- brushed off petitioners' takings claim with the blithe assertion that, under the CPNI rules, carriers would still be able to use CPNI for certain limited purposes. *Order* ¶ 43. Even the cases on which respondents rely most heavily warn that "Resolution of each case . . . ultimately calls as much for the exercise of

judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Here, the FCC has exercised no such judgment, and the rules should be vacated on that basis.[7]

[7] The FCC contends that petitioners have no significant "unrecovered investment in the data" because "[m]ost of the relevant costs . . . in all likelihood would have been expensed for ratemaking purposes." FCC Br. 34. But the value of CPNI to carriers is not represented simply by the administrative costs of collecting it. The FCC has recognized that "CPNI becomes a powerful resource for identifying potential customers and tailoring marketing strategies to maximize customer response." *Order* at ¶ 22. *See also Phillips*, 118 S. Ct. at 1933 (possession and control of property are valuable rights regardless of economically realizable value).

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify on this 21st day of October, 2002, that I have caused the foregoing **COMMENTS OF QWEST SERVICES CORPORATION** to be filed via the FCC's Electronic Comment Filing System, with a copy served via e-mail on the following entity:

Qualex International
qualexint@aol.com

/s/ Richard Grozier
Richard Grozier

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